No. 2635

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. E. ROBBINS,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

BLACK & CLARK,
Attorneys for Plaintiff in Error.

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Statement of the Case.

The plaintiff in error, defendant below, was convicted of the offense of sending an improper letter through the United States mail. He was sentenced to imprisonment at McNeill's Island, for the term of three years, and he is now before this court asking for a new trial by reason of errors in certain rulings upon the admission and rejection of testimony, and upon the misconduct of the United States attorney during the course of the trial.

I.

AS TO THE MISCONDUCT OF THE UNITED STATES ATTORNEY.

Edna M. Rogers was the complaining witness, and upon her cross-examination the following occurred:

"Mr. BLACK. Q. How old a woman are you?

A. 31.

Q. Have you any objection to telling your married name?

Mr. PRESTON. To which we object. It is wholly immaterial whether this woman is a married woman or a single woman, or a divorced woman, either.

The COURT. It does seem to be so at first blush.

Mr. PRESTON. I guess you know all about her. You have had half a dozen detectives out. I guess you know what it was.

Mr. BLACK. We object to that statement and assign it as misconduct, that we have had half a dozen detectives out.

Mr. PRESTON. Well, I can prove that you had two, to my certain knowledge.

The COURT. What was the statement? I didn't hear it.

Mr. BLACK. 'You have had half a dozen detectives out in this case.'

The COURT. Well, let the jury disregard that. If the lady has no objection to telling her name, I don't know why you should object.

Mr. PRESTON. Oh, I don't object, but I don't see what it has to do with the case. This woman's reputation is not at stake.

Mr. BLACK. I submit it is very largely at stake, as the issue will develop in this case.

The COURT. If the lady has no objection, she can tell it.

A. It don't make any difference to me, only I don't see any good in mixing him up in it.

Mr. Black. I won't press the question, if there is any reluctance whatever to answering the question."

The foregoing remarks of the United States attorney were duly objected to and the same are hereby assigned as prejudicial error and misconduct committed against the defendant.

There was no testimony at all, given at the trial, that any detective or detectives had been employed on behalf of the defendant." (Tr. pp. 23, 24.)

Again, the defendant, E. E. Robbins was placed upon the stand, and upon his cross-examination, the following occurred:

"Mr. Preston. Q. Your wife stays at home almost constantly, don't she, and some of the children, too?

A. Well, it is very frequently, that we are all gone.

Q. I will ask you if it is not a fact that it is notorious that your wife never goes out with you and that she is always at home?

A. No, sir, that is not true.

Q. *Well, it used to be true.*

Mr. Black. I object to that as misconduct.

Mr. Preston. I withdraw it.

Mr. Black. I assign it as misconduct of the grossest kind.

The Court. I would not say of the grossest kind. It can hardly be commended. The jury will disregard it.

Mr. Preston. I said I knew the doctor quite well, and I do. That is all I said.

Mr. Black. That remark is also misconduct.

The Court. Let us confine ourselves to the testimony given on the witness stand.

The foregoing remarks of the United States attorney were duly excepted to and are hereby

assigned as prejudicial error and misconduct." (Tr. pp. 35, 36.)

And again, in his opening argument, the United States attorney, referring to the personal appearance of the defendant, used the following language:

> "And, God knows there is nothing in his physical make-up that would appeal to any woman.
>
> Mr. BLACK. We take an exception to the language of the district attorney.
>
> To which remarks of the United States attorney, the defendant then and there duly excepted and hereby assigns the same as prejudicial error and misconduct." (Tr. pp. 41-42.)

And, again in his closing argument, the United States attorney, used the following language:

> "Mr. PRESTON. Has he brought in the typewriter here and allowed it to be demonstrated to you?
>
> Mr. BLACK. I except to those remarks.
>
> Mr. PRESTON. You said, Mr. Black, during the trial of this case you would be willing as a man to have the typewriting machine produced in this case.
>
> The COURT. I think you had better discuss the evidence that was introduced and not the evidence that was not.
>
> To which remarks the defendant then and there duly excepted and hereby assigns the same as prejudicial error and misconduct on the part of the United States attorney." (Tr. pp. 42, 43.)

And, again in his closing argument, in referring to the defendant's personal appearance, the United States attorney used the following language:

> "It is only necessary to look at him (referring to the defendant) to see that lasciviousness crops out in every lineament of his countenance. To which language exception was then and there duly taken and the defendant now assigns the same as prejudicial error and misconduct on the part of the United States attorney."

It will be seen from the foregoing that the entire conduct of the United States attorney showed a bitterness of feeling entirely out of place in a courtroom, and entirely inconsistent with the judicial attitude which should characterize the actions of a public prosecutor.

When it is considered that it was in effect charged and claimed all through the trial, that the purpose and object of the defendant in writing the so-called "Mary B. Brown" letter was that he might pave the way to undue familiarity with the witness, Edna M. Rogers, the impropriety of the language by the learned district attorney is clearly apparent. He speaks of *his own personal knowledge* following upon the question:

> "Q. *Is it not a fact that it is notorious that your wife never goes out with you, and that she is always at home?*"

And when the witness replied in the negative, to have the learned district attorney, with all the force at his command state as a positive fact within his own knowledge: "*Well, it used to be true,*" the prejudice to the defendant cannot be measured.

And after timely objection was made, and after the court said that such language could hardly be

commended, to have the district attorney make matters worse by saying, "I said I knew the *Doctor quite well, and I do,*" it is not possible to measure the damage that was done to the defendant in the eyes of the jury.

As to the effect of improper language of the public prosecutor in the presence of the jury, it is well at this point to quote from the case of People v. Fielding, 158 N. Y. page 542, reported in 46 L. R. A. page 641:

> "Language which might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a quasi-judicial officer, representing the people of the state, and presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action, to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy, or resentment." (p. 648.)

And again:

> "As the admonition of the court has not proved sufficient to prevent improper and dangerous appeals to the prejudice of jurors, it has become necessary, as we think, to rigidly enforce the general rule of this and many other states that requires a reversal whenever the error is raised by a proper exception. Abuse of the defendant by the prosecuting officer in his address to the jury, which was calculated to arouse their passions against him and ma-

terially prejudice him in the trial, has been held such error as would, of itself, cause a reversal. Stone v. State, 22 Tex. App. 185, 2 S. W. 585. Where the prosecuting attorney was permitted to comment on the personal appearance of the defendant, not as a witness, nor on account of his manner and bearing as such, but as indicating a probability of guilt, it was deemed sufficient to reverse a judgment of conviction. Bessette v. State, 101 Ind. 85. In Tucker v. Henniker, 41 N. H. 317, 323, the court said: 'It would seem utterly vain and quite useless to caution jurors, in the progress of a trial, against listening to conversations out of the court room in regard to the merits of a cause, if they are to be permitted to listen in the jury box to statements of facts calculated to have a bearing upon their judgment, enforced and illustrated by all the eloquence and ability of learned, zealous, and interested counsel. * * * Statements of facts not proved, and comments thereon, are outside of a cause; they stand legally irrelevant to the matter in question, and are therefore not pertinent'." (p. 649.)

"The harsh and unjust statements of the district attorney were not founded upon evidence, but rested wholly on his unsupported declarations." (p. 653.)

And again the court says in closing its opinion:

"Whether the defendant be innocent or guilty, in our opinion he has not been adjudged guilty in accordance with law, because he has not had the fair and impartial trial which the law prescribes for a person charged with crime. If we disregard a sound and well established rule in his case because we think he is guilty, we tear down one of the safeguards provided by society for the protection of its citizens, and

the precedent may at some time aid in depriving an innocent man of his liberty or his life."

"Thus, personal abuse of the accused by the prosecuting attorney in a criminal case having nothing whatever to do with the case or the facts and circumstances in proof, and which is calculated to inflame the passions of the jury against him, and the refusal of the court on request to reprimand him, require the reversal of a judgment and conviction therein."

State v. Fischer, 124 Mo. 460;

State v. Bobbst, 131 Mo. 328;

Stone v. State, 22 Tex. App. 185;

State v. Baker, 57 Kan. 571.

The United States attorney in this case violated pretty nearly every principle prescribed by the courts for the fair and orderly conduct of a criminal case. He descended to personal abuse of the defendant in referring to his appearance, not as a witness but as a man, and holding him up as an object of contempt before the jury; he stated as a fact that the defendant had half a dozen detectives hired to spy upon the prosecuting witness. There was no testimony whatever in the case in regard to detectives, and such a statement by the prosecuting attorney would well tend to prejudice the jury against him; and, lastly, the prosecuting attorney commented upon the failure of the defendant to produce his typewriter in court, which was a gross violation of the rules governing the conduct of criminal cases.

The very late case of Myrick v. U. S., 219 Fed. 1 (Circ. Court of App. First Circ.) lays down the

rule that where a defendant takes the witness-stand and confines his testimony to certain matters, he does not thereby waive his constitutional right as to testifying or not testifying upon other matters, and he does not thereby subject himself to criticism or adverse comment at the hands of the district attorney. In discussing this proposition, the court at page 10 of the decision, says:

> "The question is therefore presented whether a defendant, when set to the bar for trial before a jury upon two indictments charging different offenses, by taking the stand and limiting his testimony to a particular charge in one of the indictments, waives his constitutional right with reference to the charge contained in the other indictment, so that inferences may be drawn against him from his failure to testify as to any of the matters there charged. It seems to us that to state the question is to answer it; that it was not the intention of Congress, in the enactment of the law authorizing the trial of an accused person for distinct offenses, at the same time, on two or more indictments, to deprive him of his constitutional right not to have inferences drawn against him by reason of his failure to testify upon one indictment, should he see fit to testify to matters charged in the other indictment; and that this is especially true where the indictments are not consolidated by an order of the court, as they were not in this case, but were tried as independent and distinct matters, though before the same jury. Betts v. U. S., 132 Fed. 228, 229, 230, 234, 235, 65 C. C. A. 452."

It would be hard to find a case where the district attorney has more grievously offended the rules of propriety than in this.

The defendant was and had been a minister of the gospel, in the Methodist Church, for over twenty years. He stood charged with writing and sending through the mail a letter which, though couched in the most carefully chosen language, would well be calculated to excite in the minds of the hearers, and particularly of the jury in listening to the reading of the letter, a feeling of hostility and resentment by reason of the very fact that the defendant, being a minister of the gospel, should not be guilty of offending against good morals, and if he were proven guilty in fact there would be a natural feeling that he should be even more harshly dealt with than the ordinary sinner who makes no great pretensions as to morality and right living.

With the minds of the jurors thus prejudiced against the defendant by the very subject matter of the letter, how dangerous it is, and how violative of every principle of fair play, for the district attorney to comment upon the personal appearance of the defendant, to state as facts matters prejudicial and as to which there was no evidence whatever, and then deliberately to comment upon his failure to produce his typewriter in court, and thus leave the jury to draw the plain inference that the defendant was afraid to produce the typewriter, and that if he had produced the typewriter it would clearly have shown his guilt. Upon this point, alone, therefore, it is respectfully submitted that this court should reverse the judgment and grant to the defendant a new trial.

Another assignment of error we desire particularly to emphasize.

The ninth assignment of error is based upon the refusal of the trial court to permit the defendant to show the reputation of the prosecuting witness as to chastity in the community in which she lived. It was and is contended by the defendant that the character of the recipient of a private sealed letter is a proper matter to bring before the jury. The court refused to allow any inquiry into that subject, basing its refusal upon the case of United States v. Musgrave, 160 Fed. 700, which supports the ruling of the trial court.

The defendant relies upon the two cases:

U. S. v. Wroblenski, 118 Fed. 495;
U. S. v. Wyatt, 122 Fed. 316,

both of which sustain the contention of the defendant that the character of the recipient of a private, sealed letter is a proper matter for the jury to have laid before them.

> "The test of obscenity" says the Supreme Court of the United States, "is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences and into whose hands a *publication of this sort* may fall."
>
> "Would it," the court said, "suggest or convey lewd and lascivious thoughts to the *young and inexperienced?*"
>
> Rosen v. U. S., 161 U. S. (40 L. Ed. 610).

To the same effect is the case of U. S. v. Bennett, Fed. Cases No. 14571:

> "The test is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of the sort may fall."

It is respectfully suggested that a wide distinction should be made between the publication of an improper article in a newspaper, or in a book where *any* one may happen to see it, and where such publication may fall into the hands of any one, the most innocent, and a private, sealed letter addressed to a particular individual. If that particular individual is already in such a moral condition, is already so depraved that no communication, of whatsoever character, could have any further corrupting influence upon the mind of the recipient, it would seem reasonable that the jury should be advised of that fact, in order to determine the intent and purpose of the sender of the sealed letter in question.

We think, therefore, that it was error to keep from the jury knowledge of the real character of the prosecuting witness in this case.

In the Wroblenski case cited above, at page 496, the court says:

> "In the case of a private letter (sealed) there is no publication (U. S. v. Chase, 135 U. S. 255), and no presumption arises of intention to give publicity, or that it *will be read by others than the addressee.* The language or communication may be free from the condemnation of the statute in one instance, while it would clearly fall within it when addressed to *other persons.* So the inquiry as to the

tendency of the letter must be narrowed to its liability *to corrupt the addressee.*"

The defendant stood ready to show that the character of the addressee was extremely bad,—so bad that such a letter falling into her hands could not possibly have had any injurious effect upon her mind and character, and while he denied writing the letter, yet, for the sake of the argument, if it were admitted that he did write the letter, that should not deprive him of the right to show that such a letter could not "corrupt the morals" of such an addressee.

The case of U. S. v. Wyatt, above cited, follows the same line of reasoning as is found in the Wroblenski case, and it remains for this court to determine whether any distinction should be made between an open publication which all may read, and a private, sealed letter which the recipient alone is presumed to read.

It is respectfully submitted that the better reason and more just rule are to be found in the cases making the distinction. It cannot be in the nature of things that the same test should be applied to a sealed letter, addressed to a woman of notorious character, as to an open publication in a newspaper or book which all persons may read, and which may fall into the hands of the most innocent.

The second assignment of error concerned the identity of one of the women who was stated by

the complaining witness to be Mrs. Estelle W. Kirk, who was concealed in the house of the complaining witness when defendant called upon her. Upon being asked as to whether her name was "Eva Estelle" objection was made, and the court sustained the objection. We fail to see any reason for this ruling.

The defendant was certainly entitled to the fullest possible information concerning the identity of women who were eavesdroppers at a conversation in which the defendant was supposed to have taken part, and the jury were certainly entitled to know who the women were with whom the complaining witness was associating, and who no doubt were assisting her in an effort to entrap the defendant into making statements or admissions which could be used against him.

The fifth assignment of error is based upon the ruling of the court in sustaining the objection to the question propounded to W. C. Hill, a witness for the Government, as to where he had seen the defendant standing on a public street in the City of Salinas. We fail to see the materiality of the testimony attempted to be elicited or what bearing the action of the defendant in standing upon any corner of any street in Salinas could have upon the alleged offense of mailing an improper letter, months before the incident of "standing upon the street", about which inquiry was thus being made.

The offense, if any, had been entirely completed and the only purpose of the testimony sought to be elicited was to prejudice the defendant in the eyes of the jury. The purpose was undoubtedly to show that the defendant was endeavoring to force his attentions upon the complaining witness, and even if such were the fact, and however reprehensible his conduct might be, considering his position in society, that is not the offense for which he was being tried, and in this connection the language of this court in the case of Dwinnel v. U. S., 186 Fed. at page 759, is apposite:

> "However fraudulent the acts of the parties in respect to the relinquishment referred to, *they do not constitute the crime alleged in the indictment.*"

Paraphrasing that language, we may say: "However reprehensible such conduct might have been (assuming for the sake of the argument that it could be proven) it was not the crime alleged in the indictment."

The attempt to show an effort to force his attentions upon the complaining witness, considering the standing and position of the defendant, in the community, even if there had not been the slightest foundation for such an attempt, could not but be highly prejudicial to the defendant.

The seventh assignment of error is based upon the court's ruling in sustaining the objection of

the United States attorney to the question propounded to the witness Mary L. Wickes, as follows:

> "Q. Are you able to give the exact words she said to Mrs. Conklin?"

By this question, it was sought to be shown that the prosecuting witness had given an entirely different reason for quitting the Bible class started by the defendant in his church from that which she had given in her testimony upon the witness stand, and when permission was asked to recall the complaining witness for the purpose of asking her if she had not, in fact, said to the witness Mrs. Wickes:

> "I am not going to the Bible class any more, my aunt has one of her damned cranky spells on. Thank God it will not last a long time."

The court denied the motion that the complaining witness should be recalled, to which ruling the defendant excepted, and assigns the same as error.

The complaining witness having stated that she left the Bible class because the defendant was endeavoring to force his attentions upon her, we cannot see why it was not entirely proper to show that she had given an entirely different reason for so leaving the class, and it is respectfully submitted that the court committed error in refusing the defendant's request so to show.

Upon the entire record, it is respectfully submitted that the defendant is entitled to a reversal of the judgment and a new trial.

Dated, San Francisco,
November 1, 1915.

BLACK & CLARK,
Attorneys for Plaintiff in Error.